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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71 - 141

JO ANN COLLIGAN, by her mother and next friend, JOSEPHINE G. COLLIGAN, and VALERIE SHINE, by her father and next friend, WILLIAM SHINE, on behalf of themselves and all those similarly situated,

Petitioners,

vs.

ACTIVITIES CLUB OF NEW YORK, LTD., also known as NEW YORK WINTER SKI CLUB, a corporation; FRED KRASNY; MRS. ALBERT; PENINSULA BUS COMPANY, INC., a corporation; CHAMPION BUS COMPANY, INC., a corporation; and B and C BUS LINE, INC., a corporation.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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In the

Supreme Court of the United States

October Term, 1971

No. .....

Jo Ann Colligan, by her mother and next friend, Josephine G. Colligan, and Valerie Shine, by her father and next friend, William Shine, on behalf of themselves and all those similarly situated,

Petitioners,

vs.

Activities Club of New York, Ltd., also known as New York Winter Ski Club, a corporation; Fred Krasny; Mrs. Albert; Peninsula Bus Company, Inc., a corporation; Champion Bus Company, Inc., a corporation; and B and C Bus Line, Inc., a corporation.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The petitioners Jo Ann Colligan, by her mother and next friend, Josephine G. Colligan, and Valerie Shine, by her father and next friend, William Shine, respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered in this proceeding on May 6, 1971.

Opinion Below

The opinion of the Court of Appeals, not yet reported, appears in the Appendix hereto, p. 1a. The opinion of the

District Court for the Southern District of New York which is not reported, appears in the Appendix hereto, p. 18a.

Jurisdiction

The judgment of the Court of Appeals for the Second Circuit was entered on May 6, 1971 and appears in the Appendix hereto, p. 17a. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

Questions Presented

1. Whether section 43(a) of the Lanham Act, 15 U.S.C. §1125(a), which explicitly authorizes actions for damages and injunctive relief by "any person" damaged by false representations regarding goods and services in commerce, confers upon consumers injured by such false representations a right to sue for actual damages and for injunctive relief to prevent such false representations.

2. Whether consumers are within the zone which Congress sought to protect when it enacted section 43(a) of the Lanham Act, 15 U.S.C. §1125(a), prohibiting false representations regarding goods and services in commerce, and therefore have standing to seek injunctive relief to prevent such forbidden false representations even without an express grant of standing, under the principles of *Data Processing Service* v. *Camp,* 397 U.S. 150 (1970) and *Barlow* v. *Collins,* 397 U.S. 159 (1970).

Statutory Provisions Involved

United States Code, Title 15, §1125(a), 60 Stat. 441, c. 540 (1946):

> "Any person who shall affix, apply or annex, or use in connection with any goods or services, or any container or containers for goods, a false designation of origin, or any false description or representation, including words or other symbols tending falsely to describe or represent the same, and shall cause such goods or services to enter commerce, and any person who shall with knowledge of the falsity of such designation of origin or description or representation cause or procure the same to be transported or used in commerce or deliver the same to any carrier to be transported or used shall be liable to a civil action by any person doing business in the locality falsely indicated as that of origin or in the region in which said locality is situated, or by any person who believes that he is or is likely to be damaged by use of any such false description or representation."

United States Code, Title 15, §1121, 60 Stat. 440, c. 541 (1946):

> The district and territorial courts of the United States shall have original jurisdiction and the courts of appeal of the United States shall have appellate jurisdiction, of all actions arising under this chapter, without regard to the amount in controversy or to diversity or lack of diversity of citizenship of the parties.

Statement of the Case

Petitioners, two parochial school children, by their parents and next friends, brought the instant action in the United States District Court for the Southern District of New York alleging the following facts.

Petitioners and 151 of their classmates at the Sacred Heart Academy of Hempstead, New York, contracted with defendant, Activities Club of New York, Ltd. (the Club) for a ski tour to Great Barrington, Massachusetts, to be conducted during the weekend of January 24, 1970, for which each of the students paid $44.75 in advance. The tour was purchased in reliance on the Club's representations that each child would be provided with adequate ski equipment and qualified instruction, that safe and reliable transportation certified by the Interstate Commerce Commission would be provided between New York and Great Barrington, and that all meal costs would be included in the prepaid tour price. The Club further represented to petitioners and the other children that it was a membership club rather than an ordinary commercial tour operator and suggested, by means of flyers closely resembling those of a major interstate firm known as National Ski Tours, that the Club was affiliated with National. Some of these representations were written, some were oral, and others were disseminated by means of the United States mail.

Each of these representations was alleged to have been false. Only 88 pairs of boots and skis were provided for the 153 children. Only one qualified instructor was provided, and he spent a substantial portion of his time fitting the children with such skis and boots as were available. Of the buses used to transport the children, one poured exhaust fumes into its interior, another had faulty brakes

and only one headlight, a third broke down completely stranding 40 children and two nuns on a country road in the middle of the night. Neither the buses nor the Club was licensed or certified by the Interstate Commerce Commission. One busload of children was forced to pay for an extra meal because of the unsafe bus transportation, the cost of which defendants refused to refund. The Club was not a club at all, but a purely commercial venture, and was in no way connected to National Ski Tours whose literature it had simulated.

Petitioners brought this class action, on behalf of themselves, their classmates, and all others similarly situated, under section 43(a) of the Lanham Act (15 U.S.C. §1125 (a)). Jurisdiction was based on section 39 of the Act, 15 U.S.C. §1121. Petitioners sought damages on behalf of themselves and the other injured children as well as an injunction forbidding defendants from continuing to make the alleged misrepresentations.

The District Court dismissed the complaint on its own motion, concluding that it lacked jurisdiction for the sole reason that section 43(a) authorized actions by commercial parties but not by consumers. The Court of Appeals affirmed on the same ground. The Court of Appeals acknowledged that the instant case fell within the literal language of section 43(a), and that the question was one of first impression, but reasoned that the sole purpose of the section was to protect businessmen and that only businessmen could therefore bring an action thereunder.

Reasons for Granting the Writ

This case presents an important and recurring question regarding the jurisdiction of federal courts over interstate consumer fraud which has not been, and should be,

resolved by this Court. Without the exercise of federal jurisdiction under section 43(a), consumers will be powerless to prevent or remedy false advertising, false labeling or other misrepresentations in interstate commerce. The Court of Appeals, in denying jurisdiction, rejected basic maxims of statutory construction set out in the applicable decisions of this Court.

Section 43(a) of the Lanham Act authorizes private actions for damages and injunctive relief by any person injured by false representations in connection with goods or services in commerce. While the Act defines "commerce" as "all commerce which may lawfully be regulated by Congress," this definition is not all inclusive. "Business essentially local in nature is still outside the scope of its terms in the absence of some relationship to interstate commerce sufficient to bring it within the limits of Congressional power." *Samson Crane Co.* v. *Union Nat. Sales,* 87 F. Supp. 218, 221 (D. Mass., 1949). The need for federal jurisdiction over interstate commerce, recognized by Congress in the passage of this law, is substantial. In a time of rapid transportation and nationwide advertising campaigns, the ability of states to protect their citizens from consumer fraud is seriously limited. Footloose vendors of worthless merchandise can and do elude the jurisdiction of state law when their practices are uncovered merely by crossing "the State line." Hearings Before the Consumer Subcommittee of the Senate Commerce Committee on S. 2246, 91st Cong., 2d Sess. (1969) 30, 43 (Remarks of Mrs. Knauer, Senator Tydings). Thus the instant defendants, if an injunction were obtained against their activities in New York, could merely cross the Hudson and resume their misrepresentations the next day in New Jersey. The due process clause, as expounded in *International Shoe Co.* v. *Washington,* 326 U.S. 310 (1945), and its progeny, lim-

its the long arm jurisdiction of the states over persons and corporations which do business within their boundaries to transactions actually occurring within the state. Thus in most cases fifty separate state lawsuits would be required to enjoin a nationwide advertising campaign or to obtain damages for a consumer fraud of national scope. Even when *in personam* jurisdiction existed over the merchant, relief of a more than local nature could be obtained only if injured consumers from each of the many states concerned, with standing to seek enforcement of their own state law under applicable conflict of law principles, could be brought together to join in a civil action. Problems of barratry aside, it would as a practical matter be virtually impossible to organize such plaintiffs representing as many as fifty different jurisdictions and, so far as is known, such a project has never been attempted or succeeded in any state court. If the accuracy of representations must be adjudicated in a multiplicity of lawsuits applying different legal tests in a variety of states, a crazy-quilt pattern will emerge, forbidding a label or advertisement in some states, permitting it in others, and generating uncertainty in the rest.

The exercise of federal jurisdiction affords the only solution to these problems. The federal courts alone are authorized to issue nationwide injunctions. Unlike state courts, the District Courts can entertain as part of a class action claims arising among parties and regarding transactions entirely outside their districts. Efficient national enforcement of federally awarded damages can be obtained by merely registering the original judgment in any federal court. 28 U.S.C. §1963. Resolution in the federal courts of issues as to the accuracy of labels and representations will assure the national uniformity of decisions in the commercial area essential to the free flow of commerce among the states. Compare *Bibb* v. *Navajo Freight Lines,*

359 U.S. 520 (1959); 1 Moore Federal Practice §0.71[3.-1], p. 701.

The prevention and remedying of false advertising and labeling is of paramount national importance:

> [C]onsumer fraud is an insidious economic cancer which eats at the very vitals of our society. The fact that it continues to the extent that it does erodes the respect of the individual, especially the poor, for law enforcement. It rots their faith in the equal application of the law to the white-collar fraud robber and to the family who cannot pay for shoddy merchandise they were tricked into buying by that self-same operator. It withers our moral fiber. It misdirects our economic resources. It saps the strength of our free enterprise system. (Hearings before the Consumer Subcommittee of the Senate Commerce Committee on S. 2246, 91st Cong., 1st Sess., 15 (1969) (Remarks of Mrs. Knauer, President Nixon's Special Assistant For Consumer Affairs).

Such consumer frauds involve billions of dollars worth of goods and services every year, Comment, 114 U. Pa. L. Rev. 395 (1966), and exploitation of poor consumers has been one of the principal causes of the urban riots of the last decade. Report of the National Advisory Commission on Civil Disorders, 274-78 (1968). Even if the federal agencies with responsibilities in this area overcome the failures of the past noted by the Court of Appeals (Appendix, p. 16a, n. 37), their resources will continue to be grossly inadequate to oversee a trillion dollar economy.[1]

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[1] "The FTC and the Justice Department—the staffs and budgets of which will inevitably remain limited—must therefore choose from among the hundreds of thousands of potential consumer actions only those limited number of cases which their systems of priorities identify as germane to [the elimination of unfair and

The Court of Appeals below did not question the need for federal jurisdiction over interstate consumer frauds, but held that jurisdiction should be limited to actions brought by commercial parties. Experience with section 43(a) demonstrates that business initiated actions under the section will not stop the use of interstate commerce for the distribution of misrepresented goods and services. Since its enactment in 1946 there have been fewer than two reported decisions a year under section 43(a) in the entire country. "Developments in the Law—Competitive Torts" 77 Harv. L. Rev. 888, 908 (1964). Businessmen have preferred to respond to a competitor's misrepresentations by a countering advertising campaign, or by joining in the misrepresentation. The losses to competitors caused by such consumer fraud, and the incentive to sue, is generally far less than that suffered by the defrauded consumers. At times there may be "a 'gentleman's agreement' of deference to a fellow [businessman] in the hope that he will reciprocate on a propitious occasion." *Office of Communication of Church of Christ* v. *F.C.C.*, 359 F.2d 994, 1004 (D.C. Cir., 1966). Not surprisingly none of the tour companies deprived of plaintiff's business by the defendant's misrepresentations have initiated any legal proceedings.

This Court has repeatedly held that, even without an express grant of standing, individuals have standing to

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deceptive acts and practices]. For example, the FTC might find that a particular case involving notorious fraud, but affecting only several thousand residents of a smaller city should be rejected in favor of an action against the national advertiser whose product claims are on the borderline of deception and hence require the Commission's expert delineation. The necessity to allocate legal resources will necessarily leave unsatisfied hundreds, if not thousands, of valid cases in which consumers have suffered significant damages but which the government might choose not to prosecute." S. Rep. No. 91-1124, 91st Cong., 2d Sess. (1970).

sue to enforce a federal law, at least by means of injunction, if they are arguably within the zone of interest to be protected by the statute. *Association of Data Processing Service Organizations, Inc.* v. *Camp*, 397 U.S. 150 (1970); *Barlow* v. *Collins*, 397 U.S. 159 (1970). That the protection of the public from imposition by the use of false trade descriptions was one of the foremost purposes of section 43(a) was reiterated in eight Congressional committee reports,[2] in hearings before the patent committees of both houses of Congress,[3] and on the floor of the Congress which passed the Act by Congressman Lanham himself.[4] Primary among the treaty obligations which the Lanham Act was intended to satisfy was a duty to provide a cause of action for "any party injured" by the use of false or deceptive descriptions of goods §45. 15 U.S.C. §1127; Inter-American Convention for Trademark and Commercial Protection, §§20 and 21, 46 Stat. 2907 (1931).

In reaching its conclusion that section 43(a) gives a cause of action to commercial parties only, the Court of Appeals repeatedly and at times expressly disregarded

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[2] See e.g. Senate Rep. 1333, 79th Cong., 2d Sess., pp. 1-3 (1946); Senate Rep. 1303, 78th Cong., 2d Sess., pp. 3-4 (1944); Senate Rep. 568, 77th Cong., 1st Sess., pp. 1-2 (1941); Senate Rep. 1562, 76th Cong., 3rd Sess., p. 1 (1940); House Rep. 219, 79th Cong., 1st Sess., pp. 2-3 (1945); House Rep. 603, 78th Cong., 1st Sess., pp. 2-3 (1943); House Rep. 2283, 77th Cong., 2d Sess., p. 19 (1942); House Rep. 944, 76th Cong., 1st Sess., pp. 2-3 (1939).

[3] Hearings Before the Senate Committee on Patents, 78th Cong., 2d Sess., pp. 25, 50, 73 (1944) (remarks by Daphne Robert of the A.B.A., W. T. Kelley, Chief Counsel of the Federal Trade Commission, and Congressman Lanham); Hearings Before the Senate Committee on Patents, 69th Cong., 2d Sess., pp. 70-71 (1927) (Letter from Edward Rogers); Hearings Before the House Committee on Patents, 69th Cong., 1st Sess., pp. 49-59 (1926) (Remarks of Edward Rogers); Joint Hearings Before the Committee on Patents, 68th Cong., 2d Sess., p. 5 (1925) (remarks of William L. Symons).

[4] 92 Cong. Rec. 7522 (79th Cong., 2d Sess., 1946).

basic maxims of statutory construction laid down in the decisions of this Court.

Section 43(a) provides a cause of action for "any person" who is or believes himself likely to be "damaged" by a misrepresentation. This language literally includes the instant plaintiffs. This Court has consistently refused to read into the broad phrase "any person" or the general term "damage" any unstated restriction as to the type of person or injury covered. *American Stevedores* v. *Porello*, 330 U.S. 446 (1947) ("damage"); *American Medical Association* v. *United States*, 317 U.S. 519 (1943) ("any person"); *Nigro* v. *United States*, 276 U.S. 332 (1928) ("any person"). The Court of Appeals read in just such an unstated limitation (Appendix, pp. 6a-7a, 16a-17a).

The language of the section, which if read literally would authorize jurisdiction in this case, involves, as the Court of Appeals conceded, neither vague words nor inconsistent phrases (Appendix, p. 6a). For almost a century this Court has insisted that resort shall not be had in the construction of a statute to its legislative history when its language is clear and unambiguous. *United States* v. *Bowen*, 100 U.S. 508, 513 (1879), *United States* v. *Oregon*, 366 U.S. 643, 648 (1961). The Court of Appeals nonetheless expressly resorted to such history to overturn the plain meaning of the statute (Appendix, pp. 7a-10a).

Even if resort to the legislative history of the statute were proper, the conclusions which the Court of Appeals drew from that history were clearly erroneous. Both the predecessor statute to section 43(a) and early drafts thereof expressly limited civil actions to businessmen injured in their trade, but this limitation was dropped in the final version of the bill. (See Appendix, pp. 9a-10a). Under such circumstances this Court has held that the inference to be drawn is that Congress intended to change

in this respect the restricted scope of the earlier statute and drafts. *American Stevedores* v. *Porello,* 330 U.S. 446 (1947). The Court of Appeals not only declined to draw such an inference, but reasoned to the contrary, that the deletion of the restriction showed that Congress omitted the restriction as surplusage and thus believed that the same restriction was already implicit in the section (Appendix, p. 10a).

During hearings before the House and Senate Patent Committees an industry representative noted that the proposed provision would authorize suits by consumers and suggested it be altered to exclude such actions; neither Congressman Lanham nor the original drafter of the bill, both present, disagreed with this construction, and the suggestion was not adopted. This Court has held that, where any inference can be drawn from the silence of proponents in the face of a proferred construction, it is that they concur in it. *Chicago, etc. R. Co.* v. *Acme Fast Freight,* 336 U.S. 465, 474-5 (1949). The Court of Appeals held that in this case the silence of the bill's proponents showed they thought the construction so patently erroneous as not to merit comment (Appendix, p. 9a).

Although the language of the statute literally covers the instant case, the Court of Appeals urged that when the Lanham Act was passed Congress did not foresee the consumer protection explosion or, by implication, the possibility that consumers might use the new law to protect themselves (Appendix, pp. 11a-12a). This Court has repeatedly held that "if Congress [has] made a choice of language which fairly brings a given situation within a statute, it is unimportant that the particular application may not have been contemplated by the legislatures." *Barr* v. *United States,* 324 U.S. 83, 90 (1945). The Court of Appeals declined to follow this rule (Appendix, pp. 15a-16a).

This Court has repeatedly held that recitals of intent enacted as part of a statute can only be used to interpret statutory language which is ambiguous. *Price* v. *Forrest*, 173 U.S. 410 (1899); *Yazoo* v. *Mississippi Valley R. Co.* v. *Thomas*, 132 U.S. 174 (1889).[5] In the instant case section 45 of the Act, subject to the express caveat that it was inapplicable if "the contrary is plainly apparent from the context," stated that the purposes of the Act were, *inter alia*, to protect persons engaged in interstate commerce from unfair competition, and, as noted above, to carry out certain treaty obligations. 15 U.S.C. §1127. The Court of Appeals, disregarding the rule set out in *Price* and *Yazoo*, the caveat to section 45, and the reference to treaty obligations which in fact included obligations to give consumers rights of action, reasoned that the protection of businessmen was the sole purpose of section 43(a) and refused to permit the consuming public to sue under the section either to protect themselves or under circumstances when such suits might benefit the business community.

The Court of Appeals expressed understandable but unwarranted concern as to the possible impact on the workload of the federal courts of consumer actions under section 43(a). That section is limited to misrepresentations of goods and services in commerce, and thus does not deal with ordinary local business practices but concerns primarily regional or national sales and advertising which the states lack adequate authority to effectively control.

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[5] For instances in which the lower federal courts refused to depart from the clear meaning of an unambiguous provision in order to give effect to a statement of purpose or policy enacted as part of the statute at issue, see e.g. *In re Camden Shipbuilding Co.*, 227 F. Supp. 751, 752-3 (D. Me., 1964); *Robinson* v. *Difford*, 92 F. Supp., 145, 148 (E.D. Pa., 1950); *Woods* v. *Bauhan*, 84 F. Supp., 243, 244 (D.N.J. 1949); *General Atlas Carbon Co.* v. *Sheppard*, 37 F. Supp. 51, 54 (W.D. Tex., 1940).

Even where intrastate commerce is involved, individual actions are unlikely:

> The damage suffered by any one consumer would not ordinarily be great enough to warrant costly, individual litigation. One would probably not go through a lengthy court proceeding, for example, merely to recover the cost of a household appliance.
>
> President Nixon's Message on the Protection of Interests of Consumers, 91st Cong., 1st Sess., (1969).

Civil damage actions are only likely when a large group of consumers have been victimized by fraudulent practices so standardized as to meet the requirements of Rule 23, Federal Rules of Civil Procedure. Since the last amendment to Rule 23 on July 1, 1966, only four of 424 reported decisions in the District Court for the District of Columbia involved local consumer initiated actions,[6] even though that District Court has the same plenary law and equity jurisdiction of a base line state court. *Vogel* v. *Tenneco Oil Co.*, 276 F. Supp. 1008 (D.D.C., 1967). The President's Special Assistant for Consumer Affairs has advised the Congress that the authorization of federal class actions for all violations affecting commerce of federal and state consumer protection laws—a grant of jurisdiction far broader than that claimed here—would not impose any great burden on the Federal judicial machinery. Hearings before the Subcommittee on Improvements in Judicial Machinery of the Senate Judiciary Committee, 91st Cong., 1st Sess., 20 (1969) (Remarks of Mrs. Knauer). The use of injunctions by consumer groups and public in-

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[6] *Telephone Users Assn., Inc.* v *.Public Service Comm. of D.C.*, 271 F. Supp. 393 (1967); *Tenants Council, etc.* v. *DeFranceaux*, 305 F. Supp. 560 (1969); *Young* v. *Ridley*, 309 F. Supp. 1308 (1970); *Masszonia* v. *Washington*, 315 F. Supp. 529 (1970).

terest law firms to prevent misrepresentations will serve to reduce consumer fraud and ultimately decrease the litigation growing out of such transactions.

The exercise of federal jurisdiction is especially appropriate in the instant case, because it is only in the federal courts that the instant plaintiffs have any hope of obtaining relief. Neither New York case law nor its statutes authorize consumers to obtain injunctions against business frauds, as these plaintiffs seek to do. The Uniform Deceptive Trade Practices Act, which the Court of Appeals speculated might provide for such relief (Appendix p. 15a, n. 35) has not been enacted in New York. Collection of adequate damages for the 153 defrauded consumers is also not feasible in state courts, since New York has effectively closed its courts to consumer class actions. *Hall* v. *Coburn Corporation of America,* 26 N.Y. 2d 281 (1970). Plaintiffs have already sought, without success, to obtain assistance from the New York Attorney General and from the New York City Department of Consumer Affairs which referred them to private counsel. In short, plaintiffs have brought this action in federal court, not, as the Court of Appeals suggested, because they are "imaginative" (Appendix, p. 4a), but because they have no place else to turn.

The use of section 43(a) by consumers victimized by interstate consumer frauds continues to be urged within the legal community. See e.g., Grimes, "Control of Advertising in the United States and Germany: Volkswagen Has a Better Idea," 84 Harv. L. Rev. 1769, 1774-6 (1971); Starrs, "The Consumer Class Action—Part I: Considerations of Equity," 49 Boston U. L.Rev. 211, 246-47 (1969). The jurisdiction of the federal courts over such interstate frauds and misrepresentations is a continuing problem which should be finally resolved by this Court.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Second Circuit.

Respectfully submitted,

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APPENDIX

Opinion of the Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 100—September Term, 1970.

(Argued October 8, 1970 Decided May 6, 1971.)

Docket No. 34737

JO ANN COLLIGAN, by her mother and next friend, JOSEPHINE G. COLLIGAN, and VALERIE SHINE, by her father and next friend, WILLIAM SHINE, on behalf of themselves and all those similarly situated,

Plaintiffs-Appellants,

—against—

ACTIVITIES CLUB OF NEW YORK, LTD., also known as NEW YORK WINTER SKI CLUB, a corporation; FRED KRASNY; MRS. ALBERT; PENINSULA BUS COMPANY, INC., a corporation; and B and C BUS LINE, INC., a corporation,

Defendants-Appellees.

Before:

MOORE, SMITH and ANDERSON,

Circuit Judges.

Appeal from an order of the United States District Court for the Southern District of New York, Murphy, *Judge,* dismissing an action brought by consumers seeking injunctive relief and money damages under §43(a) of the Lanham Act on the ground that they lacked standing to maintain suit under the Act. Affirmed.

Appendix

JACK GREENBERG, New York, N. Y. (Eric Schnapper, New York, N. Y., of counsel), *for Plaintiffs-Appellants.*

SIDNEY J. LESHIN, New York, N. Y., *for Defendants-Appellees.*

MOORE, *Circuit Judge*:

This is an appeal from an order dismissing appellants' class action for money damages, an accounting for profits and an injunction brought under §43(a) of the Lanham Act,[1] on the ground that their claim failed to state a cause of action. The district court ruled on its own motion that the suit could not be maintained, because, as consumers, as opposed to commercial plaintiffs, appellants lacked standing to sue under §43(a). Without the benefit of any opposition on appeal to appellants' counsel's able brief, which sets forth the issues with beguiling simplicity, for the reasons stated below we nevertheless affirm.

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[1] 15 U.S.C. §1125(a).

Section 43(a) provides as follows:

"Any person who shall affix, apply or annex, or use in connection with any goods or services, or any container or containers for goods, a false designation of origin, or any false description or representation, including words or other symbols tending falsely to describe or represent the same, and shall cause such goods or services to enter commerce, and any person who shall with knowledge of the falsity of such designation of origin or description or representation cause or procure the same to be transported or used in commerce or deliver the same to any carrier to be transported or used shall be liable to a civil action by any person doing business in the locality falsely indicated as that of origin or in the region in which said locality is situated, or by any person who believes that he is or is likely to be damaged by use of any such false description or representation."

Appendix

The two appellants, parochial school children, by their parents and next friends, brought this suit on behalf of themselves and as members of two classes: (1) 153 students of the Sacred Heart Academy of Hempstead, New York, who allegedly were deceived and damaged by "defendants' use of false descriptions and representations of the nature, sponsorship, and licensing of their interstate ski tour service";[2] and (2) all high school students within the New York metropolitan area who are likely to be deceived and thereby injured by defendants' similarly deceptive practices in the future. The factual substance of the complaint is summarized below.

Appellants and their 151 classmates prepaid defendant Activities Club of New York, Inc. (the Club), $44.75 per person as the full price for a ski tour to Great Barrington, Massachusetts to be conducted during the weekend of January 24, 1970, in reliance upon the Club's representations that: each child would be provided with adequate ski equipment and qualified instruction; safe, reliable and properly certified transportation would be provided between New York and Great Barrington; and all meal costs would be included in the prepaid tour price.[3] These representations were conveyed by means of flyers, allegedly deceptively similar to those of National Ski Tours, a well known and reputable ski service, and by means of other written and oral communications.

The ski weekend began as represented but was cut short and proved otherwise unsatisfactory by the following de-

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[2] Complaint at 4a.

[3] Complaint at 5a.

velopments, which for purposes of reviewing the dismissal of a complaint we assume to be true: only 88 pairs of skis and boots were provided for the 153 children; only one "qualified" ski instructor was provided, who because of the equipment shortage spent all of Saturday morning fitting the children with such skis and boots as were available; the other "instructors" were high school and college students whose agreements with defendants provided for only a few hours of instruction per day; one of the buses broke down on a country road en route to Great Barrington, stranding 40 children and two chaperones in the middle of the night; another bus had faulty brakes and only one headlight and was ticketed by the Massachusetts police; another bus en route back to New York poured exhaust fumes into its interior; one of the bus drivers was intoxicated and therefore unable ot drive his bus on the return trip to New York; neither the buses nor the Club were licensed or certified by the Interstate Commerce Commission; and one busload of children was required to pay an unrefunded total of $71.75 for an extra meal in Great Barrington due to unsafe bus transportation.

In seeking redress of this apparently misfortune-strewn ski weekend brought about by the Club's misrepresentations, appellants have sought to invoke the jurisdiction of a federal court, rather than turning to traditionally available state court forums and remedies and have appended their state common law claims by way of invoking the doctrine of pendent jurisdiction. Seemingly unable to bring themselves within other federal statutes specially conferring federal court jurisdiction, and additionally unable to meet the minimum monetary requirements of 28 U.S.C. §1331 or 28 U.S.C. §1332, appellants imaginatively have

brought this action pursuant to §§39[4] and 43(a) of the Lanham Act.

The issue of consumer standing to sue under §43(a) is one of first impression for this and apparently any federal court. In concluding that it lacked jurisdiction, the district court below relied on *Marshall* v. *Procter & Gamble Mfg. Co.*,[5] which in turn relied without discussion on this court's *per curiam* opinion in the first reported §43(a) case, *Carpenter* v. *Erie R. Co.*[6] Because both these cases are clearly distinguishable from the issue at bar,[7] and there-

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[4] 15 U.S.C. §1121.

Section 39 provides as follows:

> "The district and territorial courts of the United States shall have original jurisdiction and the courts of appeal of the United States shall have appellate jurisdiction, of all actions arising under this chapter, without regard to the amount in controversy or to diversity of citizenship of the parties."

[5] 170 F. Supp. 828 (D. Md. 1959).

In *Marshall*, the district court concluded without discussion but in very clear language that in an action under §43(a) "a member of the public, as such, has no right of action under this section for personal injuries based upon alleged misrepresentation," that "the very broad language of Section 1125(a) [referring to 43(a)'s use of "any person . . ."] cannot be taken literally" and that "the injury, to be actionable under the statute, must be one which occurs in the area of commercial relations [though] the plaintiff . . . need not be a direct competitor of the defendant." 170 F. Supp. at 836, n. 8.

[6] 178 F.2d 921 (2d Cir. 1949), *cert. denied*, 339 U.S. 939 (1950).

[7] *Marshall* is distinguishable because the court grounded its dismissal on the inability of the plaintiff, suing in his capacity as an inventor, to show the required commercial injury. *Carpenter* is distinguishable on several grounds. First there were a number of grounds for decision of which lack of standing under §43(a) was one ("[T]hat section is applicable to no such circumstances as those alleged in support of his claim"), but a totally unnecessary one. The statute of limitations on Carpenter's previous claims had run

fore not conclusive authority for the district court's positio , we find it necessary to explore in detail whether there is any basis for appellants' standing to sue under §§39 and 43(a).

SECTION 43(a) AND "PLAIN MEANING"

Appellants' principal contention is that the language of §43(a), specifically the term "any person," is so unambiguous as to admit of no other construction than that of permitting consumers the right to sue under its aegis. On the face of the complaint all the prerequisites of §43(a) seem to be met: (1) defendants are persons (2) who used false descriptions and misrepresentations (3) in connection with goods and services, (4) which defendants caused to enter commerce; (5) appellants are also persons (6) who believe themselves to have been in fact damaged by defendants' misdescriptions and misrepresentations.

Viewing the terms of §43(a) in isolation there do not appear to be any vague words or inconsistent phrases which might permit any other inference than that which appellants would have us draw—*i.e.*, that "any person" means exactly what it says.[8] It is further suggested that if Con-

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some ten years before the Lanham Act was enacted, and he was "precluded from recovery in the present suit under the rule of *res judicata*" 178 F.2d at 922. Finally, Carpenter, suing for "misrepresentation of services" in his capacity as an injured former employee of the Erie Railroad, seems to have been a rather litigious person; by the time he raised the §43(a) claim, the court had grown somewhat impatient with Carpenter's reassertion of previously barred claims, which the court said "can never justify a recovery." *Id.*

[8] We note that the key language in §43(a) is not "any person" but "any person who believes that he is or is likely to be damaged by the use of any such false description or representation." The proper focus therefore is whether appellants' claims partake of the *nature of the injury* sought to be prevented and/or remedied by Congress through §43(a).

gress had desired, it could and would have limited or narrowed the class of protected plaintiffs to commercial parties merely by saying so. We reject this line of maxims of statutory construction in favor of Judge Learned Hand's more practical instruction that "[w]ords are not pebbles in alien juxtaposition," [9] and therefore turn first to §43(a)'s legislative history.

LEGISLATIVE HISTORY

We agree with appellants that "[t]he Lanham Act of 1946 has a very long and convoluted legislative history," [10]

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[9] *NLRB* v. *Federbush Company, Inc.*, 121 F.2d 954, 957 (2d Cir. 1941).

[10] Br. at 16.

For bills containing versions of the measure ultimately enacted, see H.R. 8637, 68th Cong., 1st Sess., S. 2679, 68th Cong., 2d Sess.; H.R. 6348, 69th Cong., 1st Sess.; S. 4811, 69th Cong., 2d Sess.; H.R. 13486, 69th Cong., 2d Sess.; H.R. 6683, 70th Cong., 1st Sess.; H.R. 11988, 70th Cong., 1st Sess.; H.R. 2828, 71st Cong., 2d Sess.; H.R. 9041, 75th Cong., 3rd Sess.; H.R. 4744, 76th Cong., 1st Sess.; H.R. 6618, 76th Cong., 1st Sess.; H.R. 102, 77th Cong., 1st Sess.; H.R. 5461, 77th Cong., 1st Sess. S. 895, 77th Cong., 1st Sess.; H.R. 82, 78th Cong., 2d Sess.; H.R. 1654, 79th Cong., 2d Sess.

Congressional hearings on a trademark bill were held on 14 occasions. See *Joint Hearings Before the Committees on Patents*, 68th Cong., 2d Sess. (1925); *Hearings Before the House Committee on Patents*, 69th Cong., 1st Sess. (1926); *id.*, 69th Cong., 2d Sess. (1927); *Hearings Before the Senate Committee on Patents*, 69th Cong., 2d Sess. (1927); *Hearings Before the House Committee on Patents*, 70th Cong., 1st Sess. (1928); *id.*, 71st Cong., 2d Sess. (1930); *id.*, 72nd Cong., 1st Sess. (1932); *id.*, 75th Cong., 3rd Sess. (1938); *id.*, 76th Cong., 1st Sess. (March 1939); *id.*, 76th Cong., 1st Sess. (June 1939); *id.*, 77th Cong., 1st Sess. (1941); *Hearings Before the Senate Committee on Patents*, 77th Cong., 2d Sess. (1942); *Hearings Before the House Committee on Patents*, 78th Cong., 1st Sess. (1943); *Hearings Before the Senate Committee on Patents*, 78th Cong., 2d Sess. (1944).

The various versions of the trademark bill were discussed in nine committee reports. See H.R. Rep. 944, 76th Cong., 1st Sess. (1939);

which with respect to §43(a) we find to be inconclusive and therefore of little or no help in resolving the issue decided today. We are cited by counsel to certain statements, actions and inactions and are asked to make certain causal connections among them and then to draw a set of preferred inferences therefrom. Counsel lay stress, for example, on the following statement made before a joint congressional committee in 1925 by a representative of the U.S. Trademark Association with respect to the language of a bill's provision, which, in substantially modified form, became §43(a):

> "It provides that any person who is damaged by the false description may start the suit. Obviously the purchaser might claim that he has been misled and damaged and start suit. At any rate, if it is intended to limit the right to start such a suit, that limitation should be stated." [11]

None of the committee members or draftsmen of §30 of the 1925 bill expressed any disagreement with this statement, and the provision remained unchanged, containing no express limitation barring consumer suits.

We are asked to conclude from this ancient history that the committee's silence, followed by its inaction with respect to amending this portion of the bill, must mean that Congress clearly intended to create standing for consumers

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S. Rep. 1562, 76th Cong., 3rd Sess. (1940); S. Rep. 568, 77th Cong., 1st Sess. (1941); H.R. Rep. 2283, 77th Cong., 2d Sess. (1942); H.R. Rep. 603, 78th Cong., 1st Sess. (1943); S. Rep. 1303, 78th Cong., 2d Sess. (1944); H.R. Rep. 219, 79th Cong., 1st Sess. (1945); S. Rep. 1333, 79th Cong., 2d Sess. (1946); Conf. Rep. 2322, 79th Cong., 2d Sess. (1946), for which see 92 Cong. Rec. 7522.

[11] *Joint Hearings Before the Committee on Patents*, 68th Cong., 2d Sess., 127-128 (1925) (statement of Arthur W. Barber).

under the 1946 Act. On this flimsy record, it would be self-serving for us to invoke the doctrine of "silence as acceptance" as a basis upon which to draw any consequential inference with respect to §43(a)'s legislative history.[12] We believe it more likely that the committee members evidenced no disagreement or agreement with the interpretation given §30 by the above-quoted statement because neither was necessary; the committee members probably were sufficiently confident of their own interpretation that they felt that no clarification by way of reply and/or amendment was needed to implement their intention to confer standing solely upon commercial plaintiffs.

It is also suggested that since the statutory predecessor of §43(a), §3 of the Trademark Act of 1920,[13] was addressed solely to the prohibition of false designations of origin and authorized suit only by persons, corporations, etc., *"doing business* in the locality falsely indicated as that of origin [emphasis supplied]," [14] and since this type of language

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[12] Compare *Chicago, M., St. P. R. Co.* v. *Acme Freight, Inc.*, 336 U.S. 465, 474-475 (1949), in which the Supreme Court gave substantial weight to the unchallenged and uncontradicted statement of a ranking minority congressional committee member who spoke in behalf of the bill [of which he was a principal draftsman and supporter] and presented the only extended exposition of its provisions" on the floor of the House in clear contradiction of the committee's report.

[13] 41 Stat. 534, 104, §3.

[14] This provision, although relevant for purposes of this discussion was in fact deemed to be a "dead letter," due principally to the requirement of proof of wilfulness or intent to deceive, a defect corrected by successor draft bills and ultimately by §43(a). See *Parkway Baking Co.* v. *Freihofer Baking Co.*, 255 F.2d 641, 648 n. 7 (3d Cir. 1958); *California Apparel Creators* v. *Weider of California*, 162 F.2d 893 (2d Cir.), *cert. denied*, 332 U.S. 816 (1947); *see also* Derenberg, *Federal Unfair Competition Law at the End of the First Decade of the Lanham Act: Prologue or Epilogue*, 32 N.Y.U.L. Rev. 1029, 1035 (1957) (hereinafter Derenberg).

was preserved in several early drafts of what became §43(a)[15] but was ultimately dropped by the A.B.A. Trade-Mark Committee in favor of a provision permitting suit by "any person, firm or corporation who is or is likely to be damaged by the use of any false description or representation," [16] we should conclude that the A.B.A. rejection of the earlier colorably restrictive language and the congressional acceptance of the colorably broader A.B.A. language "clearly indicates an intent [attributable to Congress][17] not to restrict the provision to actions by businessmen and tradesmen," and "a [congressional] concern to expand the class and type of person authorized to sue." [18] We, on the other hand, construe the deletion of the phrase "in his trade or business" from the earlier A.B.A. drafts to be equally consistent with a clearly expressed congressional purpose[19] to create a federal statutory tort of unfair competition *sui generis*,[20] thus rendering the subject phrase to the status of mere surplusage.

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[15] For example, an initial draft submitted by Mr. Edward S. Rogers to the A.B.A. Trade-Mark Committee authorized suit by "any person . . . who is or is likely to be *damaged in his trade or business* by any false description . . . [emphasis supplied]" Misc. Bar Ass'n Reps., v. 22, item 26, §27, Ass'n of the Bar of N.Y. catal. no. BA Misc. 681, v. 22.

[16] *Id.*, item 27, §27 (Rogers Preliminary Draft with Revisions) item 28, §27 (Committee Preliminary Draft, Second Revision); item 25, §30 (Committee final draft); item 29, §30 (Version approved by A.B.A. House of Delegates).

[17] Cf. *Shapiro* v. *United States*, 335 U.S. 1, 12 n. 13 (1948).

[18] Br. at 21.

[19] *See* 15 U.S.C., §1127, to be discussed *infra*.

[20] *Gold Seal Co.* v. *Weeks*, 129 F. Supp. 928, 940 (D.D.C. 1955), *aff'd sub nom. S. C. Johnson & Son, Inc.* v. *Gold Seal Co.*, 230 F.2d 832 (D.C. Cir. 1956), *cert. denied* 352 U.S. 829 (1956); see also *Maternally Yours* v. *Your Maternity Shop*, 234 F.2d 538 (2d Cir. 1956) (concurring opinion of Chief Judge Clark).

Appendix

PURPOSE OF §43(a) AND PUBLIC POLICY

Appellants urge that under the test of *Association of Data Processing Serv. Org.* v. *Camp*,[21] they as consumers have standing under the Lanham Act because they have demonstrated injury in fact and that they come within a group "arguably within the zone of interests to be protected" [22] by the Act. Although the scope and effects of *Data Processing* have not yet been clearly delimited,[23] we hold that that case does not bring these appellants under its protective wing.

The congressional statement of purpose of the Act[24] is contained in §45,[25] which in pertinent part states: "The intent of this chapter . . . is to protect persons engaged in such commerce against unfair competition." In this, the only phrase referring to the class of persons to be protected by the Act, as defined by their conduct and the source of the injuries sought to be protected against, no mention at all is made of the "public" or of "consumers." The legislative history of the Act, such as it is, adds nothing. We do know to a reasonable certainty, however, that the consumer protection explosion and the wholesale displacement (though not preemption) of traditional state statutory and common law remedies—matters pregnant with manifold consequences of great importance—were never considered or foreseen by Congress prior to the

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[21] 397 U.S. 150 (1970).

[22] 397 U.S. at 153.

[23] *See* Jaffe, *Comment, Standing Again*, 84 Harv. L. Rev. 633, 634 (1971).

[24] See *Cousaw Mining Co.* v. *South Carolina*, 144 U.S. 550, 563 (1892).

[25] 15 U.S.C. §1127.

enactment of §43(a). We conclude, therefore, that Congress' purpose in enacting §43(a) was to create a special and limited unfair competition remedy, virtually without regard for the interests of consumers generally[26] and almost certainly without any consideration of consumer rights of action in particular. The Act's purpose, as defined in §45, is exclusively to protect the interests of a purely commercial class against unscrupulous commercial conduct.[27]

This view is supported by the leading case of *L'Aiglon* v. *Lana Lobell, Inc.*,[28] which, while expanding the statu-

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[26] See *Standard Brands, Inc.* v. *Smidler*, 151 F.2d 34, 37-43 (2d Cir. 1945) (concurring opinion of Judge Frank) for a learned discussion of the historical-legal relationship between protection of commercial interests and consumer interests under the rubric of unfair competition, which relationship comprises the background against which Congress enacted §43(a).

[27] The court in *Gold Seal Co.* v. *Weeks*, 129 F. Supp. 928, 940 (D.D.C. 1955), succinctly stated the import of §43(a):

> "It means that wrongful diversion of trade resulting from false description of one's products invades that interest which an honest competitor has in fair business dealings—an interest which the courts should and will protect . . . It represents, within this area, an affirmative code of business ethics whose standards may be maintained by anyone who is or may be damaged by this segment of the code. In effect it says: you may not conduct your business in a way that unnecessarily or unfairly interferes with and injures that of another; you may not destroy the basis of genuine competition by destroying the buyer's opportunity to judge fairly between rival commodities by introducing such factors as false descriptive trademarks which are capable of misinforming as to the true qualities of the competitive products."

Although the language of the *Gold Seal* court would seem to permit the interpretation suggested by appellants, it seems very clearly the other way when read in the light of Judge Frank's concurring opinion in *Smidler*.

[28] 214 F.2d 649, 651 (3d Cir. 1954).

torily protected class by giving an expansionary reading to the substantive content of §43(a), still limited the protected class to commercial, though not necessarily competitive,[29] plaintiffs.[30] Although admittedly the *L'Aiglon* court was not presented with the question of consumer standing under §43(a), we deem the court's opinion in context to set the outer limits of the class of §43(a) plaintiffs contemplated by Congress. As the court noted, although §43(a) was intended to create a federal unfair competition count, since "the Lanham Act was not intended to bring all unfair competition in commerce within federal jurisdiction," [31] it was intended to be a special, limited one cov-

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[29] *Gold Seal Co.* v. *Weeks*, 129 F. Supp. 928 (D.D.C. 1955), *aff'd sub nom. S. C. Johnson & Son. Inc.* v. *Gold Seal Co.*, 230 F.2d 538 (D.C. Cir. 1956), *cert. denied*, 352 U.S. 829 (1956); *Yameta Co.* v. *Capitol Records, Inc.*, 279 F. Supp. 582, 586 (S.D.N.Y. 1968).

[30] Appellants also rely on the famous passage in Chief Judge Clark's concurring opinion in *Maternally Yours* v. *Your Maternity Shop*, 234 F.2d 538, 546 (2d Cir. 1956), that "the bar has not yet realized the potential impact of this statutory provision." We construe that statement in context to refer to the federal courts' reluctance at that time to broaden the substantive scope of §43(a), as that section represented in Chief Judge Clark's view an opportunity and an invitation to create a federal law of unfair competition, which embraces far more than mere "passing off," the unduly narrow application of the provision prevalent at that time. *See* 234 F.2d at 546-547.

[31] 214 F.2d at 654.

The Lanham Act originally included a specific section which read: "All acts of unfair competition in commerce are declared unlawful." This language was later dropped because it was regarded as "dangerously broad." Derenberg at 1063. This court has rejected the view that the Lanham Act, through §44(i), 15 U.S.C. §1126(i), creates independent federal jurisdiction over the entire field of unfair competition. See *American Auto. Ass'n* v. *Speigal*, 205 F.2d 771, 774 (2d Cir.), *cert. denied*, 346 U.S. 887 (1953); *approved*, Derenberg at 1061; compare *Stauffer* v. *Exley*, 184 F.2d 962 (9th Cir. 1950).

ering only those cases in which false description and/or false designation of origin are alleged.[32] Since Congress deliberately excluded from coverage virtually all categories of unfair competition but for false advertising, it could not have intended to create a whole new body of substantive law completely outside the substantive scope of unfair competition. Yet this is what appellants would have us find, under the guise of granting them standing, for the question of consumer standing and that of the creation of wholly new federal common law of consumer protection under §43(a) cannot be disentwined.[33]

Moreover, consumers' use of §39 of the Act, which requires the allegation of neither a minimum monetary amount in controversy nor diverse citizenship, in combination with the expansive jurisdictional delineation given the phrase "in commerce," [34] and the procedural advantages of bringing suit in federal court, would lead to a veritable flood of claims brought in already overtaxed federal district courts, while adequate private remedies for consumer protection, which to date have been left almost exclusively to the States, are readily at hand. Great strides are now

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[32] Chief Judge Hastie stated, "This statutory tort bears closest resemblance to the . . . tort of false advertising to the detriment of a competitor, as formulated by the ALI . . .," which tort makes clear that consumers must rely on other sections. Section 761 of the Restatement of Torts in pertinent part provides as follows:

> "*One who diverts trade from a competitor* by fraudulently representing that the goods which he markets have ingredients which in fact they do not have but which the goods of the competitor do have, *is liable to the competitor* . . ." [emphasis supplied].

[33] See *Textile Workers Union* v. *Lincoln Mills*, 353 U.S. 448 (1957) (dissenting opinion of Mr. Justice Frankfurter).

[34] See *Katzenbach* v. *McClung*, 379 U.S. 294 (1964) and its progeny.

being made in this area to expand the already numerous remedies available in state courts,[35] and this court has no desire to interfere with that process by an unprecedented interpretation of longstanding federal law.[36]

One of appellants' arguments favoring a literal interpretation of "any person" is that "[h]ad Congress desired to limit actions under section 43(a) to those brought by competitors or by commercial concerns generally, it could and would have so provided." Our analysis requires that the manner in which this issue be posed is precisely the reverse: had Congress contemplated so revolutionary a de-

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[35] State authorities have been far from lethargic in responding to the current consumer protection explosion. See, e.g., the Revised Uniform Deceptive Practices Act in Handbook of the National Conference of Commissioners on Uniform State Laws 306-315 (1966), which was initially approved by the Commissioners on Uniform State Laws and by the A.B.A. House of Delegates in 1964, and which has been adopted by eight states (Connecticut, Deleware, Florida, Georgia, Idaho, Illinois, New Mexico and Oklahoma). Section 3(a) of the Uniform Act has been construed unofficially to confer standing on defrauded consumers seeking injunctive relief (no money damages are provided) although the Uniform Act "originated as an effort to reform the law of business torts, not consumer torts." See Dole, *Consumer Class Actions Under the Uniform Deceptive Practices Act*, 1968 Duke L.J. 1101, 1107, 1109. Mr. Dole was a consultant to the Special Committee on Unfair Competition of the National Conference of Commissioners on Uniform States Laws from 1962 to 1965. *See also* the recently amended Massachusetts "Regulations of Business and Consumer Protection Act," Mass. Acts, ch. 690, ch. 814 (1969), amending Mass. Ann. L. ch. 93A, §§1-8 (Supp. 1968); Goodman, *An act to Prohibit Unfair and Deceptive Trade Practices*, 7 Harv. J. Legis. 122, 146-153 (1969).

[36] Cf. *Phillips* v. *Rockefeller*, 435 F.2d 976, 980 (2d Cir. 1970) (construction of the Seventeenth Amendment).

parture implicit in appellants' claims, its intention could and would have been clearly expressed.[37]

Affirmed.

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[37] Cf. *Herpich* v. *Wallace*, 430 F.2d 792, 809 (5th Cir. 1970) (scope of §10(b) of the Securities Exchange Act of 1934); 2 L. Loss, Securities Regulation 902-903 (2d ed. 1961) (scope of SEC power under §14 of the Securities Exchange Act of 1934).

Although we hold that consumers have no right of action under §43(a), we note that the federal government through the Federal Trade Commission has intervened in the marketplace and in the courts to vindicate the rights of the consuming public. Chief Judge Clark in his concurring opinion in the *California Appeal* case stated:

> "So far as the consumer is concerned, he is not dependent upon the private remedial actions brought by competitors for the remedies under the Federal Trade Commission Act . . . are now extensive . . ."

162 F.2d 896; *accord*, 1 R. Callman, Unfair Competition, Trademarks and Monopolies §18.2(b), at 626 (3d ed. 1967). That Chief Judge Clark's faith in the FTC perhaps has proved excessive, *see e.g.*, A.B.A. Committee to Study the Federal Trade Commission Report (1969); E. Cox, R. Fellmeth & J. Schulz, The Nader Report on the Federal Trade Commission (1969); Baum, *The Consumer and the Federal Trade Commission*, 44 J. Urb. L. 71 (1966), does not derogate from our conclusion that commercial and consuming classes intentionally have been provided separate remedies.

Judgment of the Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the sixth day of May one thousand nine hundred and seventy-one.

Present:

HON. LEONARD P. MOORE,
HON. J. JOSEPH SMITH,
HON. ROBERT P. ANDERSON
Circuit Judges.

JO ANN COLLIGAN, by her mother and next friend, JOSEPHINE G. COLLIGAN, VALERIE SHINE, her father and next friend, WILLIAM SHINE, on behalf of themselves and all others similarly situated,

Plaintiffs-Appellants,

v.

ACTIVITIES CLUB OF NEW YORK, LTD., also known as NEW YORK WINTER SKI CLUB, a corporation, *et al.*,

Defendants-Appellees.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the order of said District Court be and it hereby is affirmed.

A. DANIEL FUSARO
Clerk

Opinion of the District Court

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

69 Civ. 2194

JO ANN COLLIGAN, by her mother and next friend, JOSEPHINE G. COLLIGAN, and VALERIE SHINE, by her father and next friend, WILLIAN SHINE, on behalf of themselves and all others similarly situated,

Plaintiffs,

—against—

ACTIVITIES CLUB OF NEW YORK, LTD., also known as NEW YORK WINTER SKI CLUB, a corporation; FRED KRASNY; MRS. ALBERT; PENINSULA BUS COMPANY, INC., a corporation, CHAMPION BUS COMPANY, INC., a corporation; and B and C BUS LINES, INC., a corporation,

Defendants.

MURPHY, D. J.

Plaintiffs move for an order pursuant to Rule 23(c) of the Federal Rules of Civil Procedure declaring that this action may be maintained as a class action, defining the represented classes and subclasses, and declaring that said classes and subclasses have standing to maintain the action. The action is brought pursuant to sections 39 and 43(a) of the Lanham Act of 1946 (15 U.S.C. §§1121 and 1125(a)).

The two infant petitioners by their parents and next friends bring suit on behalf of themselves and as members of two classes: (1) 153 students of the Sacred Heart Academy, Hempstead, New York, who were allegedly

deceived and damaged by defendants' false representations as to the rendering of the defendants' services, and; (2) all high school students within the New York metropolitan area who may be deceived in the future by the alleged false representations of the defendants.

The plaintiffs and 151 others students of the Sacred Heart Academy, a parochial high school, purchased the services of the defendants pursuant to an advertisement. Three of the named defendants are ski tour operators, and the other three defendants are bus line companies. Each of the 153 students paid $44.75 for a ski tour. The plaintiffs allege that false representations were made by the defendants and that they did not receive all of the services promised them.

The plaintiffs, as representatives of all high school children in the New York area, seek to enjoin the ski tour defendants from making further misrepresentations of goods or services in commerce and from using flyers imitating those of a competitor, and the bus company defendants from participating in any misrepresentations.

Assuming, without deciding, that the requirements of Rule 23(a) and (b) are met, we feel constrained to resolve first the question whether such an action is authorized under the Lanham Act (15 U.S.C. §1125(a) which provides in part:

> "Any person who shall . . . use in connection with any goods or services . . . any false description or representation, including words or other symbols tending falsely to describe or represent the same, and shall cause such goods or services to enter into commerce, and any person who shall with knowledge or the falsity of such . . . description or representation cause

> or procure the same to be transported or used in commerce or deliver the same to any carrier to be transported or used, shall be liable to a civil action by any person doing business in the locality falsely indicated as that of origin or in the region in which said locality is situated, *or by any person who believes he is or is likely to be damaged by the use of any such false description or representation.* (Emphasis added.)

and section 39 which provides:

> "The district and territorial courts of the United States shall have original jurisdiction and the courts of appeal of the United States shall have appellate jurisdiction, of all actions arising under this chapter, without regard to the amount in controversy or to diversity or lack of diversity of the citizenship of the parties."

It is the plaintiffs' submission that "[t]he clear language of this statute gives a right of action to a consumer or potential consumer who is damaged or likely to be damaged by misrepresentation of goods or services in interstate commerce" and concedes that there is little judicial authority confirming consumer standing to invoke the statute. They point out that in the only two cases in which a noncommercial plaintiff unsuccessfully attempted to invoke the Act the issue of consumer standing was not reached. Carpenter v. Erie R.R., 178 F.2d 921 (2d Cir. 1949); Carpenter v. Rohm & Wass Co., 109 F.Supp. 739 (D.Del. 1952), aff'd, 201 F.2d 671 (3 Cir. 1953).

It is undoubtedly true that section 1125(a) creates a limited new federal statutory tort and does not merely codify the common law principles of unfair competition. L'Aiglon Apparel, Inc. v. Lana Lobell, Inc., 214 F.2d 649

(3d Cir. 1954); The American Rolex Watch Corp. v. Jack Laufer & Jan Voort, Inc., 176 F. Supp. 858 (E.D.N.Y. 1959); Mutation Mink Breeders Ass'n v. Lou Nierenberg Corp., 23 F.R.D. 155 (S.D.N.Y. 1959).

Judge Hastie, however, did observe in *L'Aiglon*:

> "This statutory tort is defined in language which differentiates it in some particulars from similar wrongs which have developed and have become defined in the judge made law of unfair competition. *Perhaps this statutory tort bears closest resemblance to the already noted tort of false advertising to the detriment of a competitor,* as formulated by the American Law Instituted out of materials of the evolving common law of unfair competition. See Torts Restatement, Section 761, supra. But however similar to or different from pre-existing law, here is a provision of a federal statute which, with clarity and precision adequate for judicial administration, creates and defines rights and duties and provides for their vindication in the federal courts." L'Aiglon Apparel, Inc. v. Lana Lobell, Inc., *supra* at 651 (emphasis added).

Of major importance is what Congress said the intent of the Act is. 15 U.S.C. §1127 states in part:

> "The intent of this chapter is to regulate commerce within the control of Congress by making actionable the deceptive and misleading use of marks in such commerce; to protect registered marks used in such commerce from interference by State, or territorial legislation; to protect persons engaged in such commerce against unfair competition; to prevent fraud and deception in such commerce by the use of reproduc-

tions, copies, counterfeits, or colorable imitations of registered marks; and to provide rights and remedies stipulated by treaties and conventions respecting trademarks, trade names, and unfair competition entered into between the United States and foreign nations."

Its legislative history is not too revealing but Mr. Lanham's remarks in House Report No. 2283, June 25, 1942, are quite cogent. He stated:

> "This bill, as any other proper legislation on trademarks, has as its object the protection of trademarks, securing to the owner the goodwill of his business and protecting the public against spurious and falsely marked goods. . . .
>
> "There is no essential difference between trademark infringement and what is loosely called unfair competition. Unfair competition is the genus of which trademark infringement is one of the species. . . .
>
> . . . .
>
> "To protect trade-marks, therefore, is to protect the public from deceit, to foster fair competition, and to secure to the business community the advantages of reputation and goodwill by preventing their diversion from those who have created them to those who have not. This is the end to which this bill is directed."

While it is true that part of the purpose of the Act was to protect the public, we doubt that consumers such as the plaintiffs were intended by Congress to be given the right to prosecute a claim of the type herein enumerated without more explicit statutory authorization.

We agree with Judge Watkins in Marahall v. Proctor & Gambel Mfg. Co., 170 F.Supp. 828, 836 (D.Md. 1959), where he stated, "However, whether a 'passing off' be

necessary, or it suffices that a diversion of trade be shown, it is at least necessary that the action be one for unfair competition, in which a competitive injury is alleged."

As Judge Friendly* remarked, "After prolonged cerebration . . . but without profound conviction," we hold that the plaintiffs have not stated a claim upon which relief can be granted, and their complaint is dismissed.

This is an order. No settlement is necessary.

THOS. F. MURPHY
U. S. D. J.

Dated, New York, N. Y., January 26, 1970.

* Susi v. Belle Action Stables, Inc., 360 F.2d 704, 711 (2d Cir. 1966).